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No. 87-1190

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

RAY C. BROCE AND BROCE CONSTRUCTION CO., INC.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondents defend the court of appeals' decision by claiming that, as a matter of law, the two indictments "merely show that the defendants were involved in a continuing conspiracy" (Resp. Br. 11). That assertion is unfounded. The en banc court of appeals regarded the question whether the two conspiracies were separate as a factual question that required a remand for a "factual determination" (Pet. App. 24a) by the district court. Moreover, respondents place unwarranted reliance on the fact that the two indictments do not allege ending dates for the two conspiracies. The ending dates are not stated in the indictments because the grand jury did not know when the conspiracies ended. Nevertheless, nothing in either indictment supports respondents' claim that "the conspiracies in each indictment [took] place over the same period of time" (Resp. Br. 11). In any event, even if the two conspiracies (which began 15 months apart) overlapped in time to some degree, that fact alone would not compel the conclusion

that the two separately charged conspiracies were actually part of one large conspiracy. *E.g., United States* v. *Sargent Elec. Co.*, 785 F.2d 1123, 1130 (3d Cir.), cert. denied, 479 U.S. 819 (1986); *United States* v. *Sinito*, 723 F.2d 1250, 1257 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984); *United States* v. *Inmon*, 594 F.2d 352, 354 (3d Cir.) (time period of first conspiracy completely subsumed within period of second conspiracy), cert. denied, 444 U.S. 859 (1979); *United States* v. *Wilshire Oil Co.*, 427 F.2d 969 (10th Cir.), cert. denied, 400 U.S. 829 (1970). Conspiracies that overlap in time *can* be part of a single conspiracy with multiple objects, but they can also be "separate adventures of like character" (*Kotteakos* v. *United States*, 328 U.S. 750, 769 (1946)); everything depends on the scope of the conspiratorial agreement or agreements. There is no internal inconsistency between the government's assertion that there were two separate conspiracies (J.A. 51) and an assertion that the two conspiracies overlapped in time.

Respondents' contention that the indictments do not allege separate conspiracies skirts the issue that was presented by their motion to vacate the conviction on the second indictment—whether their guilty pleas foreclosed later factual proceedings designed either to contradict or to supplement the allegations in the indictments. On its face, each indictment charges a separate conspiracy—one consisting of an agreement beginning in April 1978 to rig the Meade County project (see Pet. App. 147a), and a second consisting of an agreement beginning in July 1979 to rig the Barton County project (see *id.* at 139a). Respondents do not dispute that if those agreements were separate, then two conspiracies existed.[1] Rather, they

[1] Respondents do, however, repeatedly mischaracterize our basis for saying that the indictments on their faces charged two separate conspiracies. We do not contend that the indictments facially charge two separate conspiracies merely "because each refers to a different project" (Resp. Br. 18), nor have we ever "conten[ded] that setting up a given project on specific terms establishes that a new conspiracy exists" (*id.* at 20), nor do we "argue that a conspiratorial 'agreement' must be shown * * * much in the form of a formal contract" (*id.* at 18). Rather, we contend that agreements to rig different projects can be one conspiracy or two different conspiracies depending on the facts, and that allegations that they are two distinct agreements, beginning on two different dates, suffice to require the defendants, if they think the facts are otherwise, to put the government to its proof rather than to plead guilty and claim a double jeopardy violation later.

claim that "there was a single, continuing conspiracy to rig as many bids as possible" (Resp. Br. 10-11). There are, however, no facts alleged in the indictments that support that claim. Thus, respondents can assert their single-conspiracy theory in support of their belated double jeopardy defense only by refuting the allegations in the indictments and supplementing the record with additional factual findings. As we showed in our opening brief, neither the Double Jeopardy Clause nor any decision of this Court requires that they be allowed to do so.

Respondents observe that "[a]lthough the government admits that there was a single conspiracy at one time it offered no evidence of the conspiracy's termination" (Resp. Br. 17). In attributing significance to that fact, respondents ignore the nature of guilty-plea proceedings. The government did assert in its Official Version of the Offense that the large conspiracy ended in 1973 and was followed by separate conspiracies (J.A. 50-51). The government "offered no evidence" to back up that assertion because respondents formally relieved the government of its burden to do so. By pleading guilty, they " 'stipulat[ed] that no proof by the prosecution need be advanced' " and " 'supplie[d] both evidence and verdict,

ending controversy.' " *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 n.4 (1969) (quoting *Woodard* v. *State*, 42 Ala. App. 552, 558, 171 So. 2d 462, 469 (1965)).[2]

Although respondents repeatedly complain that the indictments in this case were vague (Resp. Br. 11, 17, 18), they were obliged to raise those objections to the indict-

[2] At the time of the guilty pleas in this case the government had compelling reasons to believe that there was no single conspiracy to rig bids in Kansas after 1973. First, respondents never challenged the government's assertions that there was no single conspiracy after 1973 and that respondents had participated in separate conspiracies to rig the bids here at issue. Second, there was considerable evidence to support the government's assertion that the single conspiracy ended in 1973. That was the year in which the organizer of the conspiracy went out of business; none of the other conspirators assumed its role (J.A. 50). Shortly thereafter, the State of Kansas changed its bid-letting procedures (*Beachner* Tr. 150-151). Thus, every witness that testified concerning this issue had "denied any overall agreement or understanding or participation in a single conspiracy" after 1973. *United States* v. *Beachner Constr. Co.*, 555 F. Supp. 1273, 1278 (D. Kan. 1983), aff'd, 729 F.2d 1278 (10th Cir. 1984). Indeed, whereas almost 100% of all state highway construction contracts were rigged before 1973, after that date only about 10% were rigged and the remaining 90% were bid competitively (*Beachner* Tr. 139-141, 198, 274-275, 386-387, 425). In these circumstances, the fact that bid rigging may have been " 'a way of life in Kansas' " (Resp. Br. 17-18 (quoting J.A. 50)), is no more telling than the fact that drug dealing might be a way of life in many cities; it does not without more make all bid riggers into co-conspirators in one large conspiracy any more than a drug epidemic in any given city would make all drug dealers into co-conspirators in one large conspiracy. In either case, the scope of any conspiracy would depend on the scope of the agreement. Finally, although the *Beachner* court subsequently concluded that there was a single conspiracy to rig bids in Kansas after 1973 (a judgment with which we do not agree but one that we do not challenge in this Court), it did so in a case in which the defendants elected to put the government to its proof and, unlike respondents in this case, did not accept the government's factual assertions by pleading guilty.

ments before pleading guilty. It is true that it is the prosecution (together with the grand jury) that determines what facts will be alleged in an indictment.[3] But the law provides a procedure for a defendant who thinks that the government's version of the facts is either inaccurate or incomplete: the defendant can contest the government's theory of the case either through pretrial motions or by the introduction of evidence during trial. A defendant may agree with the government's version of the facts and may plead guilty for that reason; or he may disagree with the government's version of the facts yet feel that he has more to gain by pleading guilty than by litigating over that disagreement;[4] or he may disagree with the government's version of the facts and choose to litigate. What the defendant may not do is keep silent about his disagreement with the government's version of the facts, plead guilty, and later insist that the Constitution gives him a

[3] For that reason, the court in *United States* v. *Inmon*, 568 F.2d 326, 331-332 (1977), aff'd on reh'g, 594 F.2d 352 (3d Cir.), cert. denied, 444 U.S. 859 (1979), on which respondents rely (Resp. Br. 18), held that it is the government that should bear the burden of proof when a defendant claims that the crime with which he is charged is the same as one to which he has already pleaded guilty. In *Inmon*, the defendant did not plead guilty to the indictment that he claimed placed him in jeopardy for a second time, but moved to dismiss that indictment on double jeopardy grounds. It was in that context that the court said the government should bear the "burden imposed by the imprecision in the description of separate offenses" (568 F.2d at 332). *Inmon* would be on point only if respondents had raised their double jeopardy issue rather than pleading guilty and the government had claimed that it did not bear any burden of showing that the offenses were not the same for double jeopardy purposes.

[4] Cf. *North Carolina* v. *Alford*, 400 U.S. 25 (1970). The defendant's cost-benefit calculus may be accurate or inaccurate, but that makes no difference. *Brady* v. *United States*, 397 U.S. 742, 757 (1970).

right to litigate a factual issue that he had no valid reason to postpone. Unconditional guilty pleas are for defendants who choose not to litigate issues of fact. Here, respondents chose not to put the government to the test on the one-conspiracy-or-two issue, and they can show no reason why they should not be held to that choice.

2. Respondents contend (Resp. Br. 17, 23-24) that their guilty pleas cannot foreclose their subsequent pursuit of a double jeopardy claim unless they entered into those pleas with the specific intent to "waive" double jeopardy rights, *i.e.*, unless the pleas constituted "an intentional relinquishment or abandonment of a known right or privilege" (*Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). Because it apparently did not occur to their attorney to raise a double jeopardy claim before respondents pleaded guilty (see J.A. 72-73), they argue that the guilty pleas in this case were not "waivers" and therefore do not affect their ability to raise a double jeopardy claim at any later time. Respondents' claim that the *Johnson* v. *Zerbst* standard rules this case, however, is conclusively refuted by the authorities cited in our opening brief and in fact is inconsistent with at least three lines of cases decided by this Court.

First, respondents' waiver claim is inconsistent with this Court's double jeopardy jurisprudence. This Court has in various circumstances held—without inquiring into the defendants' specific intent to "waive" double jeopardy rights—that defendants, by their actions, have lost double jeopardy claims that otherwise would be honored. See *Jeffers* v. *United States*, 432 U.S. 137, 150 n.15 (1977) (plurality opinion) (defendant's objection to successive prosecution of conspiracy and continuing-criminal-enterprise charges held forfeited because defendant did not discharge his "obligation to preserve his double

jeopardy point properly"); *id.* at 152, 153-154 & n.22; *United States* v. *Scott*, 437 U.S. 82, 98-99 (1978) (defendant's decision to seek midtrial termination of proceedings on grounds unrelated to factual guilt or innocence held to permit a government appeal and possible second trial, without any suggestion that the defendant's decision to seek a midtrial termination must have been made with the intent to "waive" double jeopardy rights).

Second, respondents' assertion that they must prevail in the absence of a *Johnson* v. *Zerbst* waiver is inconsistent with this Court's guilty-plea jurisprudence. In *Tollett* v. *Henderson*, 411 U.S. 258 (1973), the defendant claimed (and the court of appeals agreed, see 411 U.S. at 260) that he could collaterally attack his guilty plea because he had not, through his plea, intended to "waive" his constitutional right to challenge the racial composition of the grand jury. This Court squarely rejected that approach to guilty-plea cases (*id.* at 266):

> If the issue were to be cast solely in terms of "waiver," the Court of Appeals was undoubtedly correct in concluding that there had been no such waiver here. But just as the guilty pleas in the *Brady* trilogy [*Brady* v. *United States, supra; McMann* v. *Richardson*, 397 U.S. 759 (1970); *Parker* v. *North Carolina*, 397 U.S. 790 (1970)] were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, we conclude that respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury.

This Court's subsequent decisions in *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, 423 U.S. 61 (1975), permit certain collateral attacks on guilty pleas notwithstanding *Tollett* and the *Brady* trilogy, but they contain not the slightest hint of retreat from the proposi-

tion that the foreclosure by constitutional claims by guilty plea requires no *Johnson* v. *Zerbst* "waiver."

Third, respondents' reliance on *Johnson* v. *Zerbst* is inconsistent with this Court's cases applying the contemporaneous-objection rule to foreclose inquiry into claimed constitutional defects in trial procedure. There is no doubt that counsel's failure to raise constitutional claims at trial often results from oversight in the midst of trial rather than from any intention to relinquish a known right. Yet "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before the tribunal having jurisdiction to determine it." *Yakus* v. *United States,* 321 U.S. 414, 444 (1944); see also *Estelle* v. *Williams,* 425 U.S. 501, 508 n.3 (1976) (*Johnson* v. *Zerbst* standard does not apply to "strategic and tactical decisions, even those with constitutional implications, by a counseled accused"; rather, "if the defendant has an objection, there is an obligation to call the matter to the court's attention so the trial judge will have an opportunity to remedy the situation"). If a defendant can lose valid constitutional objections merely because he and his counsel fail to notice those objections in the heat of trial, it follows *a fortiori* that counsel's failure to notice such objections before advising his client to plead guilty is no basis to reopen matters that were fair subjects for litigation before the guilty pleas were entered.

For all of these reasons, it is irrelevant to the outcome of this case that, before respondents pleaded guilty, their counsel failed to discuss with them any possibility of raising the double jeopardy challenge that they subsequently pursued. See also *Tollett,* 411 U.S. at 267.[5] The indictments in

[5] Respondents' repeated assertion that trial counsel "didn't see the reason that both indictments charged the same crime" (Resp. Br. 5; see also *id.* at 6, 13, 17, 24) is irrelevant. Respondents have never asserted that they received ineffective assistance of counsel. Indeed, given the benefits that respondents received from the plea agreement, and the strong (though ultimately unsuccessful) arguments supporting the factual proposition that there were in fact multiple conspiracies (see note 2, *supra*), it would be untenable for respondents to claim that their counsel was ineffective in failing to recognize and pursue what was at that time an imaginative and untested theory concerning the factual relationship among various Kansas bid-rigging episodes. Similarly, although respondents appear to suggest that their guilty pleas were not knowing and voluntary (Resp. Br. 3, 5, 23), they did not raise that issue in their Rule 35 motion. In any event, the district court found that the guilty pleas were knowing and voluntary at the time it accepted the pleas (J.A. 43).

this case were facially valid, and respondents' failure to raise their fact-based double jeopardy challenge before pleading guilty permanently forecloses that challenge, without regard to respondents' subjective intent.

3. Respondents defend on two grounds the court of appeals' conclusion that the plea bargain in this case had no effect on their double jeopardy claim. Respondents first claim that this Court's decisions in *Menna* v. *New York, supra,* and *Blackledge* v. *Perry, supra,* hold that the Double Jeopardy Clause's prohibition against instituting a second prosecution for an offense previously charged is "absolute" and that plea agreements cannot alter that prohibition (Resp. Br. 15). As even the court of appeals eventually came to recognize (Pet. App. 2a), however, this Court's decision in *Ricketts* v. *Adamson,* No. 86-6 (June 22, 1987), directly refutes that claim. In *Adamson* this Court held, relying on the terms of a plea agreement, that a state may institute a first-degree murder charge for the same crime for which a defendant had been convicted of second-degree murder pursuant to a guilty plea.

Respondents claim that *Adamson* is inapplicable because that case "rel[ies] on charges that the government had a constitutional right to bring against the defendant[] in the first place" (Resp. Br. 25). That claim is inconsistent with the Court's opinion in *Adamson*. The defendant in that case had been convicted of second-degree murder and sentenced to prison (slip op. 2), and in analyzing his double jeopardy claim this Court assumed that in the absence of the plea agreement the Fifth Amendment "would have precluded prosecution of respondent for the greater charge on which he now stands convicted" (slip op. 6). Thus in *Adamson*, just as much as in this case (as respondents view it), the charge was one that the government would have had no "right" to bring in the absence of the plea agreement, but the plea agreement nonetheless sufficed to give the government that right.

4. Respondents also claim (Resp. Br. 6, 22-26) that they should not be held to their plea agreement because their motion to vacate sentence notified the government that they did not intend to be bound by the plea agreement, and that, in any event, they received no real benefits under that agreement. Respondents' claim that after they filed their motion "[t]he government could have then filed any charges they felt they could support in Kansas, Oklahoma or any other state" (*id.* at 6) is specious. Respondents waited more than a year after pleading guilty to file their motion to vacate. Since evidence inevitably becomes stale or lost after guilty pleas have been accepted, the government cannot be expected to prosecute charges that were either never filed or dismissed in reliance on a plea agreement. The Double Jeopardy Clause should not reward a defendant for not asserting a defense that could have been raised before pleading guilty. Cf. *United States* v. *Griffin*, 765 F.2d 677, 681-682 (7th Cir. 1985).

Moreover, before filing the motion to vacate, respondent Ray C. Broce had already testified under immunity before an Oklahoma grand jury and at the Oklahoma bid-rigging trial in *United States* v. *Metropolitan Enterprises*, 728 F.2d 444 (10th Cir. 1984).[6] Thus, as a practical matter, bringing an Oklahoma prosecution against Broce would have been quite difficult, since the government would have had to demonstrate that its evidence did not flow from the immunized testimony. *Kastigar* v. *United States*, 406 U.S. 441, 460-462 (1972).

Similarly, respondents incorrectly claim (Resp. Br. 24-25) that they did not benefit from the plea agreement. In fact, respondents received substantial benefits from the plea agreement, including the government's promise not to prosecute them further in either Kansas or Oklahoma. Although respondents rely on the *Beachner* case to argue that "no additional [Kansas] prosecutions were possible even absent a plea agreement" (*id.* at 25), that case was decided long after respondents entered their guilty pleas pursuant to the negotiated plea bargain in this case. When respondents signed the plea agreement, they obviously preferred the certainty of a maximum of two convictions rather than the risk of conviction and punishment on multiple bid-rigging charges. As this Court has explained, "[a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case" (*Brady*, 397 U.S. at 757). Although a defendant "might have pleaded differently had later decided cases then been the law, he is bound by his plea" (*McMann*, 397 U.S. at 774).

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[6] Broce testified before the Oklahoma grand jury in July 1982 and at the trial in September 1982. See *Metropolitan Enterprises*, 728 F.2d at 446-447. The motion to vacate was filed on February 22, 1983 (see J.A. 15, 24).

Respondents' claim that any potential indictments in Oklahoma "would be purely speculative" (Resp. Br. 25) is immaterial and, in any event, wrong. What matters is that respondents bargained for and received government concessions in return for the guilty pleas that they now seek to repudiate, not that some of those concessions related to charges that were under consideration as opposed to charges that had already been brought.[7] And respondents' extensive bid-rigging activity in Oklahoma is well documented in *United States* v. *Washita Constr. Co.*, 789 F.2d 809, 813-816 (10th Cir. 1986), and *United States* v. *Metropolitan Enterprises*, 728 F.2d at 447-448. In the absence of the plea agreement, the government would have had the option of prosecuting respondents in Oklahoma rather than granting immunity to Mr. Broce, a realistic option that, in light of the evidence of respondents' bid-rigging activities, cannot fairly be termed "speculative." Thus, respondents benefited significantly from the plea agreement and should be held to the terms of the bargain.

[7] Thus, we do not "ask[] that respondents be presumed guilty of anti-trust violations in Oklahoma" (Resp. Br. 3), nor do we "argue * * * that the second conviction in the State of Kansas was in reality a conviction for the defendants' activities in the State of Oklahoma" (*id.* at 12-13). We merely assert that it would be inequitable to relieve respondents from their guilty pleas to two facially valid Kansas conspiracy charges when those pleas were the explicit inducement for the government not to pursue further any possibility of charging respondents with Oklahoma offenses, however such charges might have turned out.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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